United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12875
CIVIL

ERNEST B. BROWNELL,

Appellant,

vs.

FRED M. MANNING, INC.,

Appellee.

Appeal from the United States District Court
for the District of Montana.

APPELLANT'S BRIEF

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AUTHORITIES CITED

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STATEMENT OF THE CASE

This action was instituted in the District Court of Yellowstone County, Montana, by Ernest B. Brownell, who will be referred to in this brief as plaintiff, against Fred M. Manning, Inc., who will be referred to as defendant, and Robert B. Hawkins, to recover damages for personal injuries sustained by plaintiff in an accident which occurred on December 27, 1946, on United States Highway No. 20, approximately nine (9) miles north of Worland, Wyoming, involving a bus owned by the Burlington Transportation Company and operated by plain-

tiff as its employee and a truck and trailer of defendant operated by Hawkins as its employee.

No service of process was ever made upon Hawkins.

Plaintiff was a resident and citizen of Wyoming and defendant of Oklahoma and, based upon this diversity of citizenship, the amount of damages claimed exceeding the jurisdictional requirement, defendant removed the case to the United States District Court for the District of Montana.

The case was tried at Billings, Montana, before the Honorable Charles N. Pray, United States District Judge, without a jury, on May 16th to 19th, inclusive, 1949. On April 22, 1950, the trial court handed down an opinion (R. pp. 24-31) and, pursuant thereto, counsel for defendant prepared findings of fact and conclusions of law (R. pp. 31-37) which were filed May 1, 1950, and upon which judgment was entered the same date. Plaintiff promptly moved the court for an order amending the findings of fact and conclusions of law or for a new trial. Under date of December 15, 1950, the trial court denied plaintiff's motion and thereupon this appeal was taken from the judgment previously entered.

STATEMENT OF FACTS

There are certain facts in the case which are not in dispute. A most terrible accident occurred about 2:30 p. m. on December 27, 1946, at a point approximately nine (9) miles north of Worland, Wyoming, on United States Highway No. 20. United States Highway No. 20, at the scene of the accident, coursed in a general north and south direction. It was what is commonly known as an oiled highway, having an oil mat twenty-two (22) feet in width with two (2) feet of shoulder on each side. This road was crossed at approximately a right angle by

a drain ditch over which a wooden bridge with bannister had been constructed at a right angle to the roadway having a roadbed twenty-four (24) feet in width between the bannisters. A collision occurred on the easterly side of the highway at a point approximately ten (10) feet northerly of this bridge between a northbound Burlington bus, loaded with eighteen (18) passengers, driven by plaintiff, and a southbound International truck with semi-trailer attached of the defendant, driven by Robert B. Hawkins.

It is not disputed that from Worland, Wyoming, north to the scene of the accident, over the route taken by the Burlington bus, and for at least some distance north of the scene of the accident the highway was covered with ice and snow. It was contended by defendant that this condition of the highway extended only approximately four hundred and twenty-five (425) feet north of the bridge near which the accident took place to a point identified in the evidence as the irrigation lateral hump.

There is dispute in the evidence as to the speed of the respective vehicles immediately prior to the collision. It is not disputed that from the time plaintiff first observed the approaching vehicle the bus traveled a course down the highway along its own right side of the roadway and across the bridge, possibly turning slightly to the east immediately before the impact. Nor is it disputed that shortly before the impact, defendant's vehicle went into a skid which continued to the point of impact.

Evidence as to the position and movement of the respective vehicles as they approached each other will be important in the consideration of the questions to be presented to this Court. Plaintiff testified as follows: He first started to pay attention to the other vehicle when he was almost to the Sam Piel driveway (R. p. 57).

The center of the Sam Piel driveway is one hundred and sixty-five (165) feet south of the center of the drainage ditch (R. p. 50). The other vehicle was some forty (40) feet north of the Martin Lamb driveway when he first started to pay attention to it (R. p. 50). The center of the Martin Lamb driveway is two hundred and fifty (250) feet north of the center of the irrigation ditch (R. p. 60). His attention was particularly called to the other vehicle when he first started to pay attention to it when the trailer of the approaching vehicle jogged out into his lane of highway. He applied his brakes when he observed the trailer jogging out into the highway. The approaching vehicle then straightened back up on its side of the highway. The approaching vehicle then made another jog out into his side of the highway, almost straightened back up, and then went into another skid which continued to the point of impact (R. pp. 60-62).

Robert Hawkins, defendant's driver, testified as follows:

"Q. Can you locate with reference to any natural objects—withdraw that—did you see a bus coming from the south?

A. Yes, sir.

Q. And about what point had you reached when you first observed that bus?

A. As well as I can remember there was some trees on the right hand side of the road, which would be the west side, is about the first recollection that I remember; it might possibly have been two or three blocks from the bus.

Q. Do you remember a rise in the road?

A. Yes, sir.

Q. Was that in front of you when you first saw the bus?

A. As well as I remember I believe there was apparently around in there.

Q. And did you at that time come to any conclusion as to where you and the bus would meet?

A. Well, from a distance—

Q. I mean if neither of you changed your speeds?

A. From the distance that we were it looked to me like there was a good possibility of us meeting on this bridge.

Q. And what was the appearance of the bridge as you approached it then from the north?

A. Well, the bridge had a railing on it that set up around three feet and was covered with what apparently looked to me like snow and it looked narrow to me from when I first seen the bus approaching.

Q. Did it look like to you at that time it would be safe to pass that bus on that bridge?

A. No, it didn't.

Q. And did you observe at that time about what speed you were traveling?

A. I imagine I was traveling around 35 miles an hour.

Q. You weren't going your full limit?

A. No, sir.

Q. Did you estimate the bus coming at about the same speed?

A. Yes, sir, it looked to me like it was probably traveling about the same rate of speed.

Q. It appeared to be on its own side of the roadway, didn't it?

A. Yes.

Q. You observed that curve in the road between the two of you at that time?

A. Yes.

Q. And did you know at that time that there was ice under that snow that you observed on that bridge from the distance?

A. No.

Q. What did you do at that time when you decided if you kept on at the same speed you would meet and pass on the bridge?

A. I tried to stop.

Q. And when you say you tried to stop—I mean what did you do in the way of trying to stop?

A. I applied the brakes to my trailer.

Q. And by what means?

A. With the hand valve.

Q. Was that the one on the right hand side of the front steering wheel?

A. Yes, sir.

Q. Did you do it solidly or lightly?

A. No, I tried to check it gradually.

Q. And what happened?

A. Well, it seemed to me like it hit some rough snow or ice on the road and caused the trailer to slew to the east.

Q. And you were rolling forward at that same speed of 35 miles, possibly a little checked at that time?

A. Approximately that.

Q. And did you then attempt to use additional means of slakening up the speed on that vehicle and equipment that you were driving?

A. When I see I couldn't check it with these trailer brakes and the trailer was going to the east, I naturally turned the truck to the east to try to go with the skid and applied the foot brake.

Q. Now, that was the foot brake that applied the air on both the trailer and the tractor?

A. Yes, sir.

Q. And how did you apply that foot brake?

A. By applying it and releasing it.

Q. You mean with your foot?

A. Yes, sir.

Q. Then can you place approximately where you were on that highway when you applied that foot brake with reference to any natural objects along the highway?

A. It seemed to me like it was as well as I remember about where that driveway come out of that farm house.

Q. Which way, on the west side or the east side of the road?

A. On the west side.

Q. And then you started your vehicle toward the east as I understand it, your left, to follow the trailer?

A. That is right.

Q. And do you know what fanning brakes is?

A. Well, that is what I would call applying and releasing brakes, touching it on and off.

Q. Was that what you were doing?

A. Yes, sir.

Q. And did you continue to do that until the vehicle got over to the east side of the highway?

A. Yes, sir.

Q. Did you observe how far to the east side of the highway the equipment went?

A. As well as I remember, it went pretty well to the east side of the highway.

Q. Then what happened?

A. It seemed like it was straightened up, and when it seemed like that the truck had gotten pretty well in front of the trailer I tried to pull it out with power by applying my foot to the brake and giving it some gas to make it pull itself.

Q. And was that the last effort you made just before the collision?

A. About the last. It was coming out of it pretty well and started across the road to the right side.

Q. Was the bus coming toward you at the same time?

A. Yes, it was.

Q. You could see a collision was imminent, could you not?

A. Yes, sir.

Q. And about how fast was your vehicle going at the time of the final impact, if you have any idea?

A. I couldn't definitely state how fast it was going but it must have been down to at least ten miles an hour.

Q. You had actually slackened it considerable, had you not?

A. Yes, sir.

Q. Did you know before putting on your brake on your trailer the first time back to the north that there was ice on that road?

A. No, sir.

Q. You had seen some snow up there on the bridge, hadn't you?

A. Yes, sir.

Q. And as you went along you observed more snow and more ice all the time, didn't you?
A. Yes, sir" (R. pp. 362-367).

On cross examination, Hawkins testified further to the following effect: He was right along by the irrigation lateral (four hundred and twenty-five (425) feet north of the bridge) when he first recalled seeing the approaching bus about possibly three (3) blocks away (R. pp. 374-375). He was at the irrigation lateral when he first noticed snow on the bridge, and he reached the snow about half way between the irrigation lateral and the bridge (R. pp. 377-378). He first skidded somewhere along the trees which started at the irrigation lateral. He was not out of control when he first skidded (R. p. 384). The trailer went into a swerve before the tractor did (R. p. 385). To the best of his recollection, when he first started sliding, the bus was approaching the south side of the bridge (R. p. 388).

There is one further fact, if it may be referred to as such, which is of particular import. Just prior to the trial of this case, there was tried before the same Court, also without a jury, the so-called Hennessey cases in which recovery was sought against both Fred M. Manning, Inc., and the Burlington Transportation Company for damages arising out of the death of two of the passengers riding in the bus.

CLAIMS OF THE PARTIES BELOW

It was contended by plaintiff that the skidding of defendant's vehicle was occasioned by the negligence of defendant's driver in the operation of such vehicle and that the consequent presence of defendant's vehicle on its wrong side of the highway was the sole proximate cause of the collision.

Defendant contended first that its driver was guilty of no negligence and that the collision was an unavoidable accident and further that the plaintiff was himself guilty of contributory negligence.

TRIAL COURT'S DECISION

The trial court rejected a contention of defendant that there was a sudden, abrupt and unforeseen change from clear dry blacktop to snow and ice at the irrigation lateral some four hundred and twenty-five (425) feet north of the bridge and, in effect, held that the defendant could not invoke the doctrine of unavoidable accident with respect to the presence of its vehicle on the wrong side of the highway.

The trial court went on to hold that plaintiff knew the condition of the highway for a distance of nine (9) miles south of the bridge; that in view of the condition of the highway, he was traveling at an excessive speed; that he must have seen the possible danger of a meeting on the bridge, especially when he observed the trouble the driver was having with his truck and trailer; that he should have come to a full stop before crossing the bridge; that the plaintiff himself was guilty of negligence which proximately contributed to the cause of the accident.

QUESTIONS FOR REVIEW

1. Was the plaintiff guilty of negligence?

2. If there was negligence on the part of the plaintiff, was such negligence a proximate cause of the collision?

SPECIFICATION OF ERRORS

It is the claim of plaintiff on this appeal that the trial court erred in the following particulars:

1. In finding the plaintiff guilty of negligence.

2. In finding that any negligence on the part of the plaintiff was a proximate cause of the collision.

3. In denying plaintiff's motion for amended findings or for a new trial.

ARGUMENT

With all due respect to the learned trial court, it conclusively appears from his opinion deciding the case that he erroneously applied the wrong legal standards to the conduct of plaintiff in reaching the conclusion that such conduct constituted negligence and that it proximately contributed to cause the accident.

Since the accident took place in the state of Wyoming, reference will be made to the law of that state wherever possible.

Defendant's Negligence.

We have pointed out above that the trial court rejected the contention of defendant that the collision was an unavoidable accident. This was based upon the established weight of authority, followed in the case of *Wallis v. Nauman,* 157 Pac. (2d) 285, in which the Supreme Court of Wyoming said:

> "The law relative to a skidding automobile which leaves its right side of the road and passes over the center of the highway into the traffic lane legally reserved for vehicles moving in the opposite direction is well expressed by the authorities now to be cited.
>
> "In *DeAntonio v. New Haven Dairy Co.,* 105 Conn. 663, 136 Atl. 567, 570, the court said: 'Failure to

keep to the right when, through no fault of the driver, an automobile skids on a slippery pavement and is thus thrown across the road, has been held to excuse failure to comply with the statute. *Chase v. Tingdale (Bros.),* 127 Minn. 401, 149 N. W. 654; *Huddy on Automobiles* (7th Ed.) 333; *Berry on Automobiles,* 865. But, if such skidding results from negligent acts or omissions of the driver, he is not absolved from the consequences of breach of the rule, although it is not deliberate or intentional.'

* * * * *

"So in *Hunt v. Whitlock's Adm'r,* 259 Ky. 286, 82 S. W. (2d) 364, 366, the court uses this language: 'The failure of the driver of a motor vehicle to keep to the right side of the center of a highway is excused where, without fault on his part, the vehicle skids across the center line; but, where its skidding results from his negligence, the doctrine of "unavoidable accident" may not be invoked to exempt liability for the consequences. *Consolidated Coach Corporation v. Hopkins' Adm'r,* 238 Ky. 136, 37 S. W. (2d) 1. It is likewise true that the skidding itself is not ordinarily evidence of negligence, where it skids across the center line of the road to the left side thereof and collides with another; *but the burden is upon the driver on the wrong side of the road to excuse or justify the violation of the law of the road. Berry on Automobiles* (4th Ed.); 1 *Blashfield, Encyl. of Automobiles,* page 414; *Chase v. Tingdale Bros.,* 127 Minn. 401, 149 N. W. 654; *Peterson v. Pallis,* 103 Wash. 180, 173 Pac. 1021; *Thomas v. Adams,* 174 Wash. 118, 24 Pac. (2d) 432; *Wilson v. Congdon,* 179 Wash. 400, 37 Pac. (2d) 892; *Leonard v. Hey,* 269 Mich. 491, 257 N. W. 733; *Johnson v. Freemont Canning Co.,* 270 Mich. 524, 259 N. W. 660.'

"Both 2 *Blashfield, Cyc. of Automobile Law,* Perm. Ed., Sec. 916, p. 58, and 3-4 *Huddy, Cyc. of Automobile Law,* Sec. 109, p. 176, announce the rule that *skidding to the left side of the road cannot be excused 'if the skidding is due to the negligent acts or omissions of the motorist.'* " (Italics supplied.)

PLAINTIFF'S CONDUCT

We have suggested that the trial court erroneously applied the wrong legal standards to the conduct of plaintiff.

In cases tried to a jury, after its verdict is returned, it becomes necessary to determine whether there is evidence to support the verdict and whether the jury was instructed properly as to the applicable law. In very few of such cases is there any other basis upon which the propriety of the verdict can be tested. If in any such case it should appear that the deliberations of the jury were had under improper or erroneous instructions as to the applicable law, the verdict is set aside and the case is resubmitted to another jury for determination.

In many cases tried to a court without a jury, the only basis upon which the decision of the court can be tested is whether there is evidence to support such decision. In such cases it is impossible to read the mind of the trial court to ascertain the legal principles applied by him in determining the questions of fact. However, if it affirmatively appears that the court applied erroneous legal principles in arriving at his decision, we respectfully submit that such decision must be set aside and the case resubmitted for decision in accordance with proper applicable law.

We have referred to the fact that the trial court only the week previous to the trial of this case had tried without a jury certain actions arising out of the death of passengers in the bus, which actions were against both the Burlington Transportation Company and Fred M. Manning, Inc., in which cases the Court found in favor of plaintiff against both defendants.

While Brownell in the operation of the bus was not an insurer of the safety of his passengers, the law imposed

upon him a duty to exercise greater care for their safety than he owed to the public generally and to the defendant specifically. See *Horsley v. Robinson* (Utah), 186 Pac. (2d) 592. It must be a certainty that counsel for plaintiffs in the so-called Hennessey cases predicated the liability of the Burlington Transportation Company on Brownell's violation of this duty to exercise a higher degree of care.

We believe there are clear indications in the opinion of the trial court (R. pp. 24-31) that Brownell was being held, conciously or otherwise, to the same duty to exercise a higher degree of care than the law imposed upon him as to the defendant. We quote the following excerpts from the opinion:

> "The bus carried eighteen passengers who were entrusted to the care of the plaintiff, who was the driver in charge. * * * The driver of the bus knew the conditions and had known them for a distance of nine miles south of the bridge and also that care and caution would be required *to insure the safety of his passengers* * * *." (Italics supplied.)

Let us examine the specific findings of fact made by the trial court to determine whether the same were arrived at upon the application of the proper legal standard of conduct applicable to the plaintiff in this case.

The Court found that plaintiff was driving at an excessive rate of speed in view of the slippery condition of the highway. Without in any way conceding the correctness of this finding, we shall defer further discussion of the same until we reach the question of proximate cause.

The Court found that plaintiff could see the danger ahead when the vehicles were eight hundred and fifty (850) to one thousand (1000) feet apart and should have slowed down and stopped before colliding with the on-

coming truck. In the first place, there is no evidence to justify the distance of eight hundred and fifty (850) feet to one thousand (1000) feet set forth by the Court. The evidence of Hawkins was to the effect that he did not see the approaching bus until he (Hawkins) got over the rise in the road at the irrigation lateral four hundred and twenty-five (425) feet north of the bridge. Since the accident occurred some ten (10) feet north of the bridge, the truck traveled a distance of at the most four hundred and fifteen (415) feet after the bus came in view. Without discussing the conflicting evidence as to the particular speed at which each vehicle was being driven, we submit that there was no evidence which would justify a finding that the bus was being operated at a speed greater than that of the truck. This means, and even assuming that the speed of the bus was at all times as high as that of the truck, that when the respective vehicles first came into view of each other they were at the most eight hundred and thirty (830) feet apart. But there was nothing at that moment which indicated to either driver that there was danger ahead.

Hawkins did testify that when he first saw the bus it appeared to him like there was a good possibility of meeting on the bridge and that it looked to him at that time that it would not be safe to pass the bus on the bridge (R. p. 363). On cross examination, he admitted familiarity with the system of highway markers used in Wyoming and that signs were put out to warn of narrow bridges; that he didn't remember seeing any such sign at the approach of this bridge and that actually this bridge could not be classed as a narrow bridge (R. p. 382). In view of the admitted physical facts that the bridge was two (2) feet wider than the blacktop, the suggestion of Hawkins that he anticipated a danger

which did not in fact exist can not be translated into a finding of fact that Brownell must have seen a possible danger of a meeting on the bridge.

The first possible indication of any danger was when the truck skidded. Plaintiff testified that the first skid of the truck took place when the truck was some forty (40) feet north of the Martin Lamb driveway. This was approximately two hundred and ninety (290) feet north of the center of the bridge. Having in mind that the bridge was twenty (20) feet in length and that the collision took place ten (10) feet north of the bridge, and again assuming an equal speed of the respective vehicles, they were at most five hundred and forty (540) feet apart. The location of this first skid by defendant's vehicle is corroborated, we believe, by the testimony of Hawkins, in spite of his inability to place his exact position at that point (R. p. 385).

But there was still no indication of danger. Plaintiff did not realize that Hawkins would thereafter lose control of his truck. Even Hawkins conceded that when he first skidded he was not out of control (R. p. 384).

And so, at some point when the vehicles were less than five hundred and forty (540) feet apart, and without attempting to fix the exact distance, Hawkins lost control of his vehicle and Brownell either became aware of the danger or, under the law, should have become cognizant thereof.

Then it became the legal obligation of Brownell to exercise reasonable care to avoid the danger. But it can not be denied that the danger was created solely by the uncontrolled presence of defendant's vehicle on the wrong side of the highway. Nor can it be denied that an emergency was created thereby. Obviously, in reaching a determination as to whether Brownell then exercised

reasonable care, he was entitled to the benefit of the so-called emergency rule. We respectfully submit that it is clear that the trial court did not consider Brownell entitled to the application of that rule. If this case had been tried to a jury, it would have been error for the trial court to refuse to instruct the jury on the basis of the emergency rule. Similarly, we submit that if the trial court determined this case without reference to such rule, its decision can not be permitted to stand.

Excepting for the moment the question of speed, and, conceding that applying the standard of care which Brownell owed to his passengers his conduct might have constituted negligence as to them which proximately contributed to cause the accident, we submit that there was no violation of his legal duty to the defendant to exercise reasonable care to avoid the collision.

Proximate Cause.

Even conceding that plaintiff was driving at an excessive speed in view of the condition of the highway, and that this constituted negligence, such negligence was not a proximate cause of the accident.

It is elementary that "the violation of a legal duty by a driver on the highway does not necessarily carry with it liability for an injury caused by his car, as to incur such liability the violation must have been the proximate cause of the injury concerning which complaint is made." *Hester v. Coliseum Motor Co.* (Wyo.), 285 Pac. 781. See also *Christensen v. McCann* (Wyo.), 282 Pac. 1061.

> "That an automobile was going at an unlawful or excessive speed, in violation of either common law rules or a statute or ordinance, at the time of a collision does not constitute a ground of liability for

injuries inflicted, or bar recovery for injuries sustained in the collision; if such violation was not a proximate cause of the accident."

Blashfield, Cyclopedia of Automobile Law and Practice, Vol. 4, part 2, 2611.

The foregoing rule of law was adopted by the Supreme Court of Wyoming in the case of *O'Mally v. Eagan,* 43 Wyo. 233, 2 Pac. (2d) 1063, 77 A. L. R. 582, rehearing denied 43 Wyo. 350, 5 Pac. (2d) 276. In this case, the plaintiff was a passenger in an automobile which, while on the wrong side of the highway, collided with an oncoming automobile. Plaintiff brought suit against both drivers. The driver of the automobile in which plaintiff was riding as a passenger entered a special appearance on account of want of proper service of summons and the case proceeded to trial against only the other defendant whose automobile was on the proper side of the highway at the time of the collision. The jury returned a verdict in favor of plaintiff in the sum of seven thousand, seven hundred dollars ($7,700.00), but the court entered a judgment notwithstanding the verdict, from which judgment plaintiff appealed. We shall not burden this brief with any lengthy quotations from the opinion of the Supreme Court of Wyoming, but we respectfully submit that the language used therein is equally applicable to the case at bar and that the legal principles there enunciated and applied are equally determinative here.

We also call the Court's attention to the annotation in 77 *A. L. R.* 598, and, particularly, the cases therein referred to involving a car speeding when other vehicle on wrong side of highway.

So that the position of plaintiff on this appeal may be clearly understood, without conceding that any conduct on his part constituted negligence, it is contended that

as a matter of law the sole proximate cause of the collision was the presence of defendant's vehicle upon the wrong side of the highway. Nor can there be any doubt as to the correctness of that portion of the trial court's decision that such presence on the wrong side of the highway can not be explained away on the theory of unavoidable accident.

Justice Requires New Trial.

It shall be contended that the case should be remanded with instructions to the trial court to amend the findings of fact by adding a finding that the negligence of defendant was the sole proximate cause of the collision, by adding a finding as to plaintiff's damages and by amending the findings of fact and conclusions of law accordingly.

In any event, if the foregoing contention is not granted, there should be a new trial of all issues.

The printed transcript of record is quite lengthy and the only evidence omitted is that pertaining to plaintiff's injuries and damages. It may be suggested that other evidence which was printed is in the nature of surplusage. This was deemed necessary to avoid any possible suggestion that evidence was omitted intentionally by the appellant and then perhaps accidentally by respondent, which would justify the result reached by the trial court. We earnestly contend that an examination of the entire record, having in mind the correct applicable principles of law, must lead to the conclusion that the decision of the trial court was not a fair, just and proper result.

The trial court itself voiced uncertainty as to the correctness of his decision.

"After hearing the testimony of physicians and surgeons in respect to their services in behalf of the plaintiff there can be no question that he was severely injured in the collision, that the driver of the truck and trailer was also injured and thereafter hospitalized, and, further, that several passengers in the bus lost their lives in the accident, all of which is to be deeply regretted, but these lamentable facts do not relieve the Judge of his serious duty to determine the responsibility for this tragic occurrence by resolving the evidence and attending circumstances to the best of his judgment and ability, *and for any error committed the learned members of the higher tribunal will readily find and apply the correct solution*" (R. p. 29).

"As was stated in the ruling on the motions for new trial in the Hennessey cases, relating to the same accident, the court has been unable to find any new matter of sufficient importance to cast doubt on the correctness of the decision, findings and conclusions heretofore rendered in said cause. *Whether the court is correct in so holding will not be known until a review can be had by higher authority.* As the court understands the facts and law deemed applicable, to grant a new trial would unnecessarily delay proceedings and postpone to an unreasonable extent the final outcome of the case" (R. p. 42). (Italics supplied.)

What could possibly have been the nature and basis of the Court's expressed uncertainty? The Court must be presumed to have had full knowledge of the well established rules applicable to appeals to the Circuit Court of Appeals. These rules have been set forth in numerous cases, and we assume counsel for defendant, in its effort to sustain the lower court decision, will cite specific cases to the following effect:

"A finding of fact by the court sitting without a jury is equivalent to a verdict, and hence will be disturbed only when it is clearly erroneous, or shows

that the judge was influenced by improper motives, or misunderstood the evidence.

"Findings of trial court on questions of fact, unless manifestly erroneous, will be affirmed.

"A finding by the trial court will not be disturbed by the court on appeal, when there is *any* evidence to support it." (Italics supplied.)

What did the trial court mean when it said that "to grant a new trial would unnecessarily delay proceedings and postpone to an unreasonable extent the final outcome of the case?" The Court must have appreciated the fact that if the Appellate Court ordered a new trial the postponement of the final outcome of the case would be much further delayed by the time required for appeal.

We submit that the trial court must have realized that there was doubt as to the propriety of the legal principles applied by the Court to the evidence in reaching its decision, and we believe it has been fully demonstrated that in this respect the doubt of the Court was justified.

CONCLUSION

We agree with the trial court that the final outcome of this case should not be postponed further unreasonably. The presence of the defendant's vehicle on the wrong side of the highway can not be explained away on the theory of unavoidable accident but was the result of defendant's negligence and was the sole proximate cause of the accident. The case should be remanded with appropriate instructions to the trial court for such further proceedings as may be necessary to grant to plaintiff the damages sustained by him.

In any event, in the interest of justice, there must be at the very least a new trial as to all issues so that plaintiff may have a proper appraisal of the evidence and de-

termination of the facts governed by correct legal principles.

Respectfully submitted,

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